No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

On Writ Of Certiorari To The Court Of Special Appeals Of Maryland

---

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Do the principles enunciated in *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) and *Heller* v. *New York*, 413 U.S. 486, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973) immunize alleged violators from criminal liability for any conduct or activity occurring prior to a judicial determination of the fact of obscenity?

2. Is an undercover police officer who made a determination that certain magazines purchased by another officer were obscene, precluded under the principles enunciated in *Roaden* v. *Kentucky* and *Heller* v. *New York* from making a warrantless arrest and a warrantless seizure constructive or otherwise, and is the exclusionary rule applicable to the use of material acquired as evidence?

3. Whether the holding of the Appellate Court that the material taken from the Silver News Book Store should have been excluded from the Respondent's trial, and without the same there would have been insufficient evidence to convict, is sufficient to justify reversal of the conviction and dismissal of the charging document?

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland in *Macon* v. *State*, is reported at 57 Md. App. 705, 471 A.2d 1090, *cert. denied*, *State* v. *Macon*, 300 Md. 795, 481, A.2d 240 (1984).

STATEMENT OF THE CASE

During the months of April and May, 1981, the Prince George's County Vice-Criminal Intelligence Section were investigating whether there were obscene magazines within the adult book stores in Prince George's County

(M3-85).[1] This investigation and the group of officers involved was headed up by Sergeant Alan A. MacDonald (M3-84), who established the procedure that would be used by other officers conducting the investigation (M3-85). The officers were instructed to go into the book store and look for magazines that basically on its "cover showed sexual acts that may *be distasteful to them*". (M-386, M3-102)

The investigation continued until approximately May of 1981 and resulted in approximately forty arrests and raids, eighteen of which included employees of Silver News, an adult book store located in Prince George's County, and there were occasions when the same employee was arrested more than once. A large number of the arrests were made without warrants or prior judicial scrutiny by a neutral and detached magistrate having the opportunity to "focus searchingly on the issue of obscenity." At no time did a neutral and detached judicial officer view the material prior to the arrests or thereafter.

On May 6, 1981, Detective Ray Evans, following the instructions of Sergeant MacDonald, entered the Silver News Adult Book Store located at 2488 Chillum Road. He was there to look or search for magazines that on their cover showed sexual acts that were distasteful to him. He was then to take them outside to Detective Sweitzer, after paying for them with a $50.00 dollar bill. The plan was that Detective Sweitzer, following the instructions of Sergeant MacDonald, would determine if the magazine selected by Evans was obscene and then Detective

[1] These transcript page references were not included in the Joint Appendix, but can be found in the Reporter's Official Transcript of Proceedings (Motions), volume III (M-3) in the Circuit Court for Prince George's County, Maryland appearing at R. 124.

Sweitzer, who had in his possession, a "statement of charges," would arrest the cashier for "distribution of obscene material." The plan was further to take back the $50.00 dollar bill originally given to the cashier as evidence to be used at the trial, and retain possession of the magazines.

This is exactly what happened on May 6, 1981, to Baxter Macon, one of the clerks in the store. *Detective Sweitzer* went into the store after he had determined that the magazines selected by Detective Evans were obscene and *Detective Sweitzer arrested the clerk* without a warrant and took back the $50.00 dollar bill, keeping the change Detective Evans had received. Customers were requested to leave and the store was closed and the clerk was taken to the police headquarters for processing. At the time Detective Sweitzer arrested the Respondent, a search without a warrant was conducted for the $50.00 bill. It was eventually found in the bottom of the cash register. At this point, the magazines were unlawfully in the possession of Detective Sweitzer as he kept them without due process of law and without payment therefore. This unlawful retention or seizure took place when the money was confiscated and the change was not returned.

SUMMARY OF ARGUMENT

1. The principles enunciated in *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) and *Heller* v. *New York*, 413 U.S. 486, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973) read in parimateria immunize alleged violators from criminal liability for any conduct or activity occurring prior to a judicial determination of the fact of obscenity by a neutral and detached magistrate who has had an opportunity to "focus searchingly on the issue of

obscenity". The necessity for judicial scrutiny in the form of an ex-parte determination of probable cause on the obscenity issue is to temporarily erode or evaporate the "presumption of protected expression" and "protected setting" under the First Amendment recognized in *Roaden* and *Heller, supra*, and until such a procedure or process is completed, the conduct or activity of an alleged violator is not subject to criminal liability and the first step in the criminal prosecution cannot constitutionally begin because of the special constraints of the First and Fourteenth Amendments. The conduct of the alleged violator must be judged in light of the legal status of the material at the time he is said to distribute the same, not at some later date.

2. An undercover police officer may not make a warrantless arrest or seizure without a warrant on the basis that there was a distribution of obscene material to another undercover police officer in a business open to the public, under circumstances where he substitutes his judgment as to the obscenity of the material for that of a neutral and detached magistrate. Until there is prior judicial scrutiny and a probable cause determination of obscenity, there is no probable cause that a crime is committed in the officer's presence to justify a constitutional arrest or seizure without a warrant of presumptively protected material or the distributor of the same. The police are not free to adopt whatever procedure they desire in attempting to regulate the alleged distribution of obscene material. The procedure accepted and recognized in *Roaden* v. *Kentucky* and *Heller* v. *New York*, *supra*, must be adhered to in order to avoid interference with First Amendment, Fourth Amendment, Fifth Amendment and Fourteenth Amendment rights. The exclusionary rule is applicable to the fruits of unlawful and unconstitutional police conduct.

3. Under *Burks* v. *United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), an Appellate Court is authorized to "go beyond relief sought" in order to provide that relief which would be "just under the circumstances" where an Appellate Court is of the opinion that evidence unlawfully and unconstitutionally acquired should have been excluded from the trial; the court is justified in reversing the conviction on the realistic basis that on retrial there would be insufficient evidence to convict. Dismissal of the charging document in light of the exclusion of evidence is also "just under the circumstances", for to retry the obscenity issue without the material in light of the guidelines that the trier of fact must follow under *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), would be a re-trial in futility and certainly not in the best interest of judicial economy. To begin the re-trial with instructions to exclude the evidence would result in the same relief which the Appellate Court granted.

ARGUMENT I

THE PRINCIPLES ENUNCIATED IN *ROADEN* V. *KENTUCKY* AND *HELLER* V. *NEW YORK* IMMUNIZE ALLEGED VIOLATORS FROM CRIMINAL LIABILITY FOR ANY CONDUCT OR ACTIVITY OCCURRING PRIOR TO A JUDICIAL DETERMINATION OF THE FACT OF OBSCENITY BY A NEUTRAL AND DETACHED JUDICIAL OFFICER WHO HAS HAD AN OPPORTUNITY TO "FOCUS SEARCHINGLY ON THE ISSUE OF OBSCENITY."

"The setting of the bookstore or the commercial theatre are each presumptively under the protection of the First Amendment". Further, the material distributed or exhibited therein is considered to be a presumptively legitimate distribution or exhibition under the protection of the First Amendment. *Roaden* v. *Kentucky supra*.

Because of this constitutional presumption under the First Amendment, an alleged violator's conduct or activity must be judged in light of the legal status of the material he distributes or exhibits at the time the distribution takes place, and not at some later date, to subject him to criminal liability, as the constitutional presumption immunizes him until the presumption of a legitimate distribution is evaporated or eroded. Until such time, the constitutional presumption continues in effect.

The procedure for temporarily evaporating or eroding the presumption of a legitimate distribution under the First Amendment was enunciated in *Roaden*, *supra*, and *Heller* v. *New York*, *supra*. That procedure requires a neutral and detached judicial officer to make a probable cause determination the material is obscene, having an opportunity to "focus searchingly on the issue of obscenity". Once this occurs, the presumption is temporarily evaporated or lifted and at some subsequent time the alleged violator's conduct is and can be judged in a different light, for the *legal status* of the material he distributes or exhibits has temporarily changed, although in content or character, it remains the same. The constitutional presumption is judicially evaporated in order that the first step in the prosecution of an alleged violator may consitutionally begin. The presumption as to the material and the setting once again becomes viable at the time of trial and continues "until at least five members of this court have declared the material obscene." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d. 446 (1973).

Because ". . . [T]he line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed or punished is finely drawn . . .

The separation of legitimate from illegitimate speech calls for . . . "sensitive tools", which are necessary to break down this barrier or wall between the prosecution and alleged violator, created by this heavy constitutional presumption under the First Amendment.

For these reasons under the facts and circumstances in this case, the prosecution of the Respondent should never have begun; and the action of the Court of Special Appeals should be affirmed. If the conduct of the Respondent is to be judged in light of the legal status of the material he allegedly distributed on May 6, 1981, at a time prior to any judicial erosion or evaporation of the constitutional presumption in favor of the material, and the setting in which it was distributed, the Respondent is immune from criminal responsibility under the principles enunciated in *Roaden* and *Heller*, *supra*.

ARGUMENT II

AN UNDERCOVER POLICE OFFICER WHO MADE AN AD HOC DETERMINATION THAT TWO MAGAZINES PURCHASED BY ANOTHER OFFICER WERE OBSCENE IS PRECLUDED UNDER THE PRINCIPLES ENUNCIATED IN *HELLER* V. *NEW YORK*, 413 U.S. 486, 93 S.CT. 2789, 37 L.ED.2D 745 (1973) AND *ROADEN* V. *KENTUCKY*, 413 U.S. 496, 93 S.CT. 2796, 37 L.ED.2D 757 (1973), FROM MAKING A WARRANTLESS ARREST OF THE DISTRIBUTOR AND A WARRANTLESS SEIZURE CONSTRUCTIVE OR OTHERWISE; AND THE EVIDENCE ACQUIRED SHOULD BE EXCLUDED FROM USE AT A TRIAL UNDER THE FOURTH AND FIFTH AMENDMENTS.

The factual situation in the matter before this Honorable Court is similar if not almost identical to the facts considered by the Court in *Roaden* v. *Kentucky*, supra. It is uncontested that (a) Detective Sweitzer had no warrant when he arrested the Respondent for the distribution of obscene magazines, to another police officer, Detective

Evans, (b) that there had been no prior determination by a judicial officer on the question of obscenity, and (c) that the arrest was based solely on Detective Sweitzer's personal conclusion the magazines were obscene.

The variance from the facts in *Roaden, supra,* is in the Petitioner's claim that the selection of the magazines by Detective Evans and payment for the same, with confiscation of the money paid after arresting the Respondent, was not a *search* and seizure, as the material was lawfully acquired prior to any illegality. But for this difference, the uncontested facts in this matter would be similar to those in *Roaden, supra.* For in *Roaden,* it was uncontested that there was a seizure without a warrant.

A search, to which the exclusionary rule may apply has been described as one in which "there is a quest for, a looking for, or a seeking out of that which is offered against the law, by enforcement personnel." *Vargas* v. *State of Texas,* Court of Criminal Appeals, 542 S.W. 2d 151, 153. In *Lustig* v. *United States,* 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 819, (1949), Justice Frankfurter described a "search" in these terms: [s]earch is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction is made of illicitly obtained objects for subsequent proof of an offense. 338 U.S. at 78, 69 S.Ct. at 1374.

Detective Evans was under instructions from Sergeant MacDonald to go into the book store and look for magazines that basically on its "cover showed sexual acts that may be distasteful to him." (Detective Evans) (M3-86) (M3-102) He was then instructed to take them to Detective Sweitzer waiting outside who was to inspect the contents and determine if they were obscene, and if so, *Detective Sweitzer was to arrest* the Respondent. This is the procedure that was developed by Sergeant MacDonald to be followed by Detective Evans and Detective Sweitzer (M3-84, 85, 86).

These facts demonstrate official conduct consisting of a joint venture to circumvent a court-decreed procedure for the separation of legitimate from illegitimate speech that "demands a greater adherence to the Fourth Amendment warrant requirement," than the process for the seizure of "contraband or stolen goods, or objects dangerous in themselves." *Roaden* v. *Kentucky, supra,* 413 U.S. at 502, 93 S.Ct. at 2800.

Respondent recognizes that "implications of a search are inherent in any quest for evidence by the police, and, does not suggest that every instance of such a seeking is a search." The conduct of Detective Evans has to be scrutinized in light of the circumstances surrounding his instructions by Sergeant MacDonald to determine whether his conduct and that of Detective Sweitzer are covered by the constitutional provisions regulating search and seizure in light of the First and Fourteenth Amendments. Detective Evans was instructed to look for magazines that "on its cover showed sexual acts" that may be distasteful to him. It was also pre-determined that the money paid for the magazines would be taken back at the time of the arrest without a warrant and the magazines impounded as evidence of the illegal distribution to Detective Evans. The money is not necessary as an *element of evidence* for the crime of distribution under Article 27, Annotated Code of Maryland, 1982 replacement volume. Section 417, (3) defines distribute as follows: "distribute," *means to transfer possession of, whether with or without consideration.* The confiscation of the money as evidence alleged by the Petitioner makes clear the intent was never to allow the Respondent to keep payment for the material distributed. This conduct, Petitioner argues, is a taking of

property with due process of law and not a seizure that invokes the Fourth Amendment guaranties. There are no facts in the instant matter that realistically suggest "a now or never situation." To the contrary, there was ample time for the detectives to take the magazines to a magistrate and secure an arrest warrant and a search and seizure warrant. See page 24, Petitioner's Brief. The officers could have decided to take their information to a Commissioner and seek an arrest warrant for the clerk. *The seizure of the magazine in this case took place when the arresting officer, who had come into possession of the magazines from Detective Evans, arrested the Respondent and confiscated the money in addition to retaining the magazines.* Possession in this fashion is not the mode or method by which any ordinary paying customer acquires property from a store open to the public. To the contrary, this is a taking of property "without due process of law," a seizure. Therefore, the uncontested fact of a seizure without a warrant present in *Roaden, supra,* appears in the instant case by circumstance of logic. Petitioner attempts to evade this fact under the Ruberic the magazines were purchased rather than unconstitutionally seized, because in the first instant, payment was made to the Respondent.

A complete review of the testimony makes clear that every aspect of the investigation in search of obscene material was prearranged, including the re-possession of the money given in "payment" for the evidence. Yet, an element essential to the validity of the search and unlawful retention of the magazines, judicial concurrence regarding the obscene nature of the evidence was absent; and the failure to seek a judge's opinion on the obscenity of the magazines could not have been inadvertent, for in this case, the decision not to seek a judge's opinion had already been pre-determined before the warrantless arrest. The inescapable conclusion here is that the procedure adopted

was designed in part to evade that phase of the warrant procedure whose specific purpose is the protection of the First Amendment freedoms. *Roaden* and *Heller, supra.*

The alleged purchase in many instances of the investigation, as part of a single planned transaction, was immediately followed by a warrantless arrest and the seizure of the money given in exchange for the allegedly obscene matter, and the Respondent's situation fell into this category. Such a transaction cannot be considered a purchase considering the parties involved. There was no intent to part with the money as in an ordinary sale, and the appropriation of the alleged obscene magazines and money was tantamount to a warrantless seizure. *State* v. *Furuyama*, 637, P.2d 1095 at 1011.

First Amendment considerations militate against the approval of transactions expressly designed to evade specific warrant requirements governing the seizure of material arguably subject to constitutional protection. The submission of material patently obscene in the opinion of the police officer, for judicial examination may not have served a purpose, but it still was incumbent upon them to do so. *Roaden, supra,* for as this Court so aptly put it:

> "the point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. It's protection consists in reqiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competetive enterprise of ferreting out crime. *Johnson* v. *U.S.*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948).

"Closing the courtroom door to evidence . . . (flowing from) official lawlessness" is the customary remedy for violations of Fourth Amendment Rights, *United States* v.

Crews, 445 U.S. at 474, 100 S.Ct. at 1251 (1979) and the public interest would be better served by suppressing the evidence obtained as a consequence of the unlawful arrests. For the exclusionary "rule" is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d. 1969 (1960). Suppression and exclusion of illegally *retained* evidence consisting of allegedly obscene magazines is "the only effective sanction for infringements of First and Fourth Amendment freedoms". *Roaden, supra*. Suppression is necessary "to vindicate the public's right of access to information and expressive material arguably protected by the First Amendment." Whether the material unlawfully *retained* is one, several or large quantities of magazines. The remedy is designed to dissipate a possible "chilling effect" on free speech.

The Fourth Amendment violations occurring in the case before this Honorable Court involve the unreasonable seizure of the person and his property. This Court has maintained that a warrant for the seizure of expressive material should "not be issued solely on the conclusionary opinion of a police officer that the material is obscene." *Roaden, supra*, 413 U.S. at 506, 93 S.Ct. at 2802. A logical corollary to this holding is that a police officer may not effect a warrantless arrest in a setting where First Amendment freedoms are implicated. A warrantless arrest in any situation is justified only if there is probable cause to believe an offense has been or is being committed. A similar showing of such probability is a pre-requisite to the issuance of a warrant authorizing a search and seizure. But just as an officer's conclusiory opinion that arguably protected material is obscene does not give rise

to probable cause supporting the issuance of a warrant authorizing its seizure, such opinion cannot sustain the warrantless arrest of its putative promoter. *Roaden* v. *Kentucky, supra*, 413 U.S. at 504-506, 93 S.Ct. at 2801-2802. *Marcus* v. *Search Warrant*, 367 U.S. at 731-32, 81 S.Ct. at 1715-1716. The arrest of the Respondent cannot be upheld under the Fourth Amendment as it was premised on the ad hoc obscenity determination of police officers, nor can the retention of evidence be justified. *Roaden* v. *Kentucky, supra*, 413 U.S. at 504-506, 93 S.Ct. at 2801-2802.

It would appear that this case is to be controlled by *Roaden* v. *Kentucky, supra*. It would seem that Roaden clearly holds a police officer may not arrest, search or seize without a warrant on a charge of distributing obscene material in a place of public accommodation such as a bookstore where he substitutes his judgment as to the obscenity of the material for that of a neutral and detached magistrate. The exceptions under which an arrest and seizure of "contraband or stolen goods or objects dangerous in themselves" *Coolidge* v. *New Hampshire*, 408 U.S. 443, 472, 91 S.Ct. 222, 29 L.Ed.2d 564 (1971) are, as stated in *Roaden*, 413 U.S. at 502, 93 S.Ct. at p.2800" to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth and Fifth Amendment standards." No such exigent circumstance as contended by the Petitioner's appear here. The clear purport of this decision is that the sometimes sophisticated value judgments necessary to establish guilt or innocence under obscenity laws must, to preserve First Amendment rights, be passed upon by a judicial officer rather than a member of the police department. To the same effect, see *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d, 1313 (1968) and *Marcus* v. *War-*

rant, 367 U.S. 717, 91 S.Ct. 1708, 6 L.Ed.2d 1117 (1968). Nothing in the aforementioned authorities in any way limit law enforcement officers from seizing persons or alleged obscene materials through the use of warrants properly prepared, issued and executed. *Roaden* and *Heller, supra.*

Seventy five years ago, in *Boyd* v. *United States*, 116 U.S. 616, 630 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886) considering the Fourth and Fifth Amendments running almost into each other, on facts before it, this Court held that the doctrines of those Amendments:

> "Apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitute the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liability and private property . . . Breaking into a house and opening boxes and drawers are circumstance of aggravation; but any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to conviction of a crime or to forfeit his goods, is within the condemnation . . . (of those Amendments)".

The Court noted that "Constitutional provisions for security of persons and property should be liberally construed . . . It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments therein," 116 U.S. at 635, 6 S.Ct. at 535.

The warrantless arrest of the Respondent, the confiscation and impoundment of the magazines and the change from the Fifty Dollar Bill, are within the condemnation of the Fourth and Fifth Amendments.

This Court had the opportunity in the case of *Lo-Ji Sales, Inc.* v. *State of New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1978) to comment on the argument "that by virtue of the Petitioner's display of the items to the general public in areas of its store open to them, Petitioner had no legitimate expectation of privacy against governmental intrusion." Respondent in *Lo-Ji Sales, supra*, relied on *Rakas* v. *Illinois*, 435 U.S. 922, 98 S.Ct. 1483, 55 L.Ed.2d 515 (1978) suggesting that no warrant was needed for the *search* and seizure of materials allegedly obscene.

To this, the Court responded "there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale *searches* and seizures that do not conform to Fourth Amendment guarantees."

In *Lo-Ji, supra*, an investigator for the New York State Police purchased two reels of film. Upon viewing them, he concluded they were obscene. He took them to a town justice who viewed the films in their entirety, and based on an affidavit of the investigator, a warrant was issued authorizing the *search* of the store and seizure of other copies of the two films viewed by the town justice. The only thing to be seized were copies of the two films purchased by the officer. Before going to the store, the town justice also signed a *warrant* for the arrest of the clerk who sold the two films. The store clerk was immediately placed under arrest and advised of the "search warrant." The search began in an area of the store which contained booths in which silent films were shown in coin operated projectors. The search party then moved to an area in which books and magazines were on display. The town justice reviewed the magazines, spending less than ten seconds, and no more than a minute, looking through each

one. When he was satisfied that probable cause existed, he immediately ordered the copy he had reviewed, along with copies of the same or "similar" magazines seized. The original search and seizure warrant only authorized the *search for and seizure* of copies of the two magazines purchased by the police officer and listed on the warrant. The additional *search* and *seizure*, once on the premises, of "similar items" of those viewed by the magistrate was without a warrant. The items *searched for and seized* were later listed on the warrant, after the seizure and *impoundment* of the material.

The search in *Lo-Ji, supra*, began when the local justice and his party entered the store. But at that time, there was not sufficient probable cause to pursue a *search* beyond looking for additional copies of the two films specified in the warrant that had been *viewed* by the town justice prior to going to the store. This Court commented in *Lo-Ji, supra*, as to the "validity of *searching* even for those," in addition to the fact that "nor can it reasonably be argued that the search was incident to arrest of the store clerk." *Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

This Court in *Lo-Ji, supra*, pointed out "we have repeatedly said that a warrant authorized by a neutral and detached officer is a more reliable safe guard against improper *searches* (emphasis applied) than a hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting-out-crime,' " *Johnson* v. *United States, supra* at 14, *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). See also *Coolidge* v. *New Hampshire, supra, at 450.*

In addition, the Respondent was made aware by this Court's opinion in Lo-Ji, supra, that "of course contraband may be seized without a warrant under the plain view doctrine, but this Court has recognized special constraints upon *searches* and seizures of material arguably protected by the First Amendment, e.g., *Heller* v. *New York, supra; Marcus* v. *Search Warrant, supra.*

This Honorable Court rejected the state's contention in *Lo-Ji, supra*, that it acted in compliance with *Heller* v. *New York, supra*, and further recognized that when the justice instructed the police to seize "similar items" he left the determination of what was "similar" to the officer's discretion, a determination that the officers are precluded from making under the First Amendment.

This Court's observation in *Lo-Ji, supra*, that "the town justice viewed the films not as a customer, but without the payment a member of the public would be required to make" and "similarly, in examining the books, he was not seeing them as a customer would ordinarily see them," is applicable to the factual situation herein. For when Detective Evans entered the book store and examined certain magazines that he felt would be distasteful to him he was not seeing them as a customer would ordinarily see them. He was searching or looking for obscene material without a warrant. Nor was he viewing the magazines as a customer who would intend to pay for them and allow the proprietor to keep the money paid for the magazines as he had pre-determined that the money would be taken back. Equally applicable to the facts in the instant matter are principles that under the First and Fourth Amendments presumptively protected material may not be impounded without a warrant. See *Roaden, supra.*

For these reasons, the conduct of Detective Evans and Detective Sweitzer are comparable to the conduct of the police officers condemned in *Lo-Ji, supra.* Our society is better able to tolerate the alleged business of p[illegible]nogra-

phy where the Respondent was employed than procedures designed by police to circumvent the First and Fourth Amendment warrant requirements designed by this Honorable Court.

For these reasons, the holding of the Court of Special Appeals is correct and should be affirmed.

ARGUMENT III

REVERSAL OF THE RESPONDENTS CONVICTION AND DISMISSAL OF THE CHARGING DOCUMENT WAS PROPER TO PROVIDE THAT RELIEF WHICH WOULD BE "JUST UNDER THE CIRCUMSTANCES".

In *Burks* v. *United States*, *supra*, this court recognized that *Forman* v. *United States*, 361 U.S. at 425, 80 S.Ct. at 486, indicated an Appellate Court is authorized by Sec. 2106 to "go beyond the particular relief sought" in order to provide that relief which would be "just under the circumstances". This then would would apply equally to the Court of Special Appeals in the instant matter.

The respondent had in the course of his prosecution sought a "judgment of acquittal on the basis that the evidence was legally insufficient and also had moved for a new trial".

In finding that the matter taken from the Silver News Bookstore should have been excluded from the Respondent's trial, the Court of Special Appeals concluded that without the material there would be insufficient evidence to convict. Since the Respondent had once been convicted, the Double Jeopardy Clause would preclude a second trial once the reviewing court has found the evidence used or to be used insufficient. No evidence at all would then constitute insufficient evidence. A realistic application then, of an Appellate Court's authority to "go beyond the relief sought in order to provide the relief

which would be just under the circumstances", to the circumstances in the present case justifies reversal and dismissal of the charging document; for to require a retrial as to the issue of obscenity, where the material alleged to be obscene is excluded from the trial is to inflict an undue financial burden on the trial court and the state judicial system. Petitioner well knows that the material admitted in the first trial is indeed indispensable to successful prosecution. The trier of fact cannot make the determination as to obscenity of the material alleged to be obscene without viewing the same in its entirety in order to apply the three-part test enumerated by this Court in *Miller* v. *California*, *supra*.

It would, therefore, seem that the only realistic application of *Burks*, *supra*, in light of the facts and circumstances in the case was taken by the Court of Special Appeals, "in order to provide that relief which would be just under the circumstances".

For these reasons, it is respectfully suggested that the holding of the Court of Special Appeals was correct under the circumstances and should be affirmed.

CONCLUSION

This Court as been consistent in holding that a police officer may not make a warrantless arrest for the distribution of obscene material under circumstances where he substitutes his judgment as to the obscenity of the material for that of a neutral and detached magistrate. He also may not make a warrantless search for or seizure of allegedly obscene material. This Court has further repeatedly said that a warrant authorized by a neutral and detached judicial officer is "a more reliable safe guard against improper *searches* (emphasis applied), then the hurried judgment of a law enforcement officer 'engaged in

the often competitive enterprise of ferreting-out-crime.' " See *Lo-Ji Sales*, v. *New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1978). An aspect of the warrant procedure tailored to protect First Amendment freedoms could not have been meant for easy evasion with a modicum of ingenuity. To sanction the conduct of the police officers in the instant matter would be the nullification of this Courts-decreed "sensitive tool" to separate legitimate from illegitimate speech.

As this Court has indicated, our society is better able to tolerate the business of pornography than a return to the general warrant era. It is respectfully suggested that this is also applicable to conduct that attempts to nullify this courts-decreed procedure in connection with warrantless arrests, searches and seizures in the First Amendment area.

As indicated heretofore, the factual situation in the matter before this Honorable Court, is similar to that of *Roaden, supra*, and in particular, *Lo-Ji, supra*, for in *Lo-Ji*, the police officer was instructed by the town justice to make a search for similar obscene material without a warrant, leaving the discretion to the police officer as to what is obscene. And in the instant case, the police officer was instructed by his superior to look for and/or search for obscene material which was distasteful to him, thereby leaving the total discretion to the police officer initially to determine in his search what was obscene without any judicial concurrence in the instant matter. In the instant matter as *Roaden, supra*, the police officer was allowed to substitute his judgment as to what was obscene for that of a neutral and detached judicial officer.

For these reasons, the judgment of the Court of Special Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Constitution:

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property; without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV:

SECTION L

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Annotated Code of Maryland (1982 Repl. Vol.):

Article 27

OBSCENE MATTER

§ 417. Definitions.

As used in this subtitle,

(1) '*Matter*' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(2) '*Person*' means any individual, partnership, firm, association, corporation, or other legal entity.

(3) '*Distribute*' means to transfer possession of, whether with or without consideration.

(4) '*Knowingly*' means having knowledge of the character and content of the subject matter.